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Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

10 EAST 40th STREET BUILDING, INC.,

Petitioner,

—against—

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICALLEF, FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ, CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO CHIVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO, SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KASSABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL, PETER MACREDI, ELIA VECCHIONE, MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH S. RAYZAK, HERBERT B. McCLELLAND, THOMAS ROSSO, GAETANO GRECK, JOHN I. ORTIZ, GILBERT ORTIZ, PASQUALE A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ, SALVADOR SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KASSAB, JOSEPH CEFAI, JOSEPH HERRERA, EMIL J. CISEK, and CHARLES G. BORG, suing in behalf of themselves and all other employees and former employees of defendants similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, 10 East 40th Street Building, Inc., respectfully shows:

Summary Statement of the Matter Involved.

Petitioner prays for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit, which held that respondents, elevator operators, porters, watchmen and other maintenance employees (R. 1049, 1050) employed by the petitioner in its office building at 10 East 40th Street, in the City of New York, were engaged in the production of goods for commerce within the meaning of Section 7(a) of the Fair Labor Standards Act of 1938 [29 U. S. C. §207(a)] and, therefore, were entitled to overtime compensation, liquidated damages and counsel fees under said Act.

Said decision was made in reversing a judgment of the United States District Court for the Southern District of New York, which dismissed respondents' complaint on the merits (R. 1114-16). In their complaint respondents claimed that they were covered by said Act by reason of their engagement in commerce and in production of goods for commerce, as defined by said Act.

The Circuit Court opinion expressly states:

> "Decisions of other circuits which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the Borella* case and to which we shall adhere here."

There is thus a frank avowal that the decision herein conflicts with decisions in other circuits.

The opinion rejects respondents' contention that these building employees were engaged in interstate commerce. It is based on the holding that they were engaged in the production of goods for commerce.

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* Borella v. Borden, 145 Fed. 2nd ——, certiorari granted —— U. S. —— January 2, 1945.

This ultimate holding is, in turn, based on the holding that because more than 20% of the building was occupied by sales and executive offices of manufacturing and mining concerns, elsewhere engaged in manufacture and mining, these tenants were there engaged in the production of goods for commerce and therefore the elevator men and other service employees who served them were, likewise, engaged in the production of goods for commerce.

Indeed, it is of the essence of the opinion, in order to arrive at the 20% degree of occupancy which is used as a criterion, to hold that sales offices and sales agencies are producers of goods for commerce, even though not a shred of work making toward actual production is done on the premises.

Opinions Below.

The Circuit Court of Appeals wrote an opinion which has not yet been reported. The opinion of District Judge Murray Hulbert is reported in 51 F. Supp. 528.

Facts.

The facts are not in dispute. Petitioner, a New York corporation, owns a multi-tenanted forty-eight story and basement office building at 10 East 40th Street in New York City. Its business consists of the management and operation of and rental of space in said building (R. 1068). Petitioner employed respondents as maintenance workers in said building.

The building may be fairly described as a typical metropolitan office building.

During the period covered by the complaint, there were in all 111 tenants who occupied 89% of the rentable area of the building (R. 1069-70).

The Circuit Court of Appeals summarized the occupancy of the building, as follows:

> "(1) Executive and sales offices of twenty concerns carrying on elsewhere the business of manufacturing and mining. The offices are used for executive and administrative activities, for conferences and for taking orders for substantial quantities of merchandise of considerable value manufactured and shipped, from factories and mines elsewhere located, to customers in several states.

(There is no evidence whatever separating the amount of space occupied for executive or for sales office purposes, as hereinafter pointed out.)

> (2) Offices of sales agencies representing seventeen manufacturers and mining concerns carrying on elsewhere the business of manufacturing and mining. The offices in the building are used to sell a variety of the products of the company they represent. As a result of the efforts of these agencies substantial amounts of merchandise of considerable value are shipped across state lines from factories, mines, and warehouses, elsewhere located in various parts of the country.
>
> (3) Twenty-four lawyers and law firms carrying on the usual activities incident to the practice of law.
>
> (4) The United States Employment Service which places white-collar workers in various factories and business houses.

(5) Advertising agents and publicity and trade organizations which carry on publicity and advertising work using national publications, newspapers and radio. One publishing firm is included in this group. Its business here consists of the purchase and receipt of scripts, the examination and correction of the same and the regular business and financial activities of the firm. The officers and employees of the trade organization are principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere printed and in most cases distributed from places other than the building herein.

(6) Engineering and construction firms which carry on their correspondence and executive and administrative activities from the offices in this building.

(7) Investment, financing and credit organizations which use their offices for their executive and administrative work. The investments, financing and credit work is done in connection with businesses and projects located in various parts of the country.

(8) Offices of import and export firms which make arrangements for export and import of a variety of goods of substantial value.

(9) Miscellaneous tenants including dentists, charitable organizations, etc., whose activities are not interstate in character."

It is undisputed, and the trial court found, that there was "no manufacturing of any kind carried on in the office building" (R. 1048). The Trial Court also made, and the

Circuit Court of Appeals did not reverse, the finding that the amount of space utilized in the building

> "in connection with the publicity and advertising prepared in or outside of the building * * * in relation to the entire volume of business transacted and carried on by the tenants at and from said premises is not substantial" (R. 1048).

Rejecting respondents' contention that they were covered by the Act because they were "engaged in commerce", the Circuit Court held that respondents were, nevertheless, engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. In doing so, the Court considered the space occupied by said groups of tenancies, holding:

1. "That the investment, finance and credit organizations, the engineering and construction firms, as well as the lawyers, the United States Employment Service and the miscellaneous tenants described above are not engaged in the production of goods for commerce. These tenants occupy about 44% of the available space and 49% of the rented part of the building."

2. That the executive and sales offices of manufacturing and mining concerns in class (1) which occupy 26% of the rentable area and 29% of the rented space in the building were engaged in production,—this based upon the holding in *Borella* v. *Borden*, 145 F. 2d —— CCA 2, cert. granted —— U. S. —— January 2, 1945.

3. That the publicity concerns occupying 6.5% of the rentable area and 7.5% of the rented area were likewise engaged in production.

4. That sales agencies representing mining and manufacturing concerns, which occupy 9.5% of the available area and 10.5% of the rented area, were engaged in production because the contracts procured by them caused goods to be transported and they were thus "'necessary' to the 'transporting'". Said court also held that sales agents "may be considered as engaged in 'handling' the goods by arranging their transfer from one person to another".

The Circuit Court of Appeals adopted the 20% test of substantiality set by the Wage and Hour Administrator and thus found that the building was substantially devoted to production of goods for commerce.

In making its decision, the 2nd Circuit Court of Appeals stated that other Circuits

> "which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the *Borella* case and to which we shall adhere here."

It should be pointed out, however, that the decision herein represents an extension of the holding in *Borella* v. *Borden*, 145 F. 2d ——, 7 WHR 804 (certiorari granted —— U. S. —— January 2, 1945). In the *Borella* case, The Borden Company, owner of the office building and employer of the plaintiffs in that case, was engaged in manufacturing milk products and itself occupied 58% of the rentable area of its building. In such space were housed the officers and employees of The Borden Company who, as stated in the opinion of the Circuit Court of Appeals, supervised, managed and controlled its entire manufacturing business. This fact, the Circuit Court held, brought the plaintiffs in that case

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"nearer to 'production' than were the employees in A. B. Kirschbaum v. Walling, Administrator, supra (316 U. S.

517) * * * " *Borella* v. *Borden*, 145 F. 2d ——, 7 WHR 804 (C. C. A. 2d), cert. granted January 2, 1945.

In the case at bar, the defendant office building owner is not engaged in production of goods in the building or elsewhere and there is no finding that the tenants direct production activities of their factories and mines from the building herein.

In fact, the undisputed evidence is that some of the manufacturing and mining company tenants maintain offices in New York purely as a convenience (R. 344-45; 347; 820) and a number of the larger manufacturing companies, such as General Motors Corporation (R. 212), Tennessee Eastman Corporation (R. 219), Chase Brass & Copper Co. (R. 708) and Thomas A. Edison, Inc. (R. 379) use their offices solely for sales purposes.

To sustain its decision under said 20% test of substantiality, it was, therefore, necessary for the Circuit Court to hold, as it did, that selling constitutes production of goods for commerce. Said the Court:

> "Thus, transportation of goods until their delivery to the ultimate consumer is 'production' as defined by the statute. A sales agent who procures the contracts in performance of which the goods are 'transported' is therefore engaged in the production of goods for commerce, since he is 'necessary' to the 'transporting.'"

Application has not been made for reargument, reconsideration or rehearing in respect to the decision of the Circuit Court of Appeals for the Second Circuit. Its order for a mandate was entered on December 27, 1944 and its mandate has been stayed and withheld pursuant to order to show cause signed by Judge Augustus N. Hand of said

Court dated December 21, 1944, until the hearing and determination of petitioner's application for a thirty day stay pending this application by your petitioner for a writ of certiorari to said Court.

Jurisdictional Statement.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347).

Questions Presented.

On the basis of the foregoing, petitioner desires this Court to review the following questions:

1. Whether the administrative and selling activities conducted by manufacturing and mining company tenants in the office building herein were "necessary" to and thus constituted "production of goods for commerce" within the meaning of the Fair Labor Standards Act because such companies were elsewhere engaged in manufacturing and mining.

2. Whether sales agencies and their salesmen and office workers, housed in petitioner's office building, were engaged therein in activities "necessary" to and were thus engaged in the "production of goods for commerce" within the meaning of said Act, because the contracts procured by said agencies or sales representatives brought about the transportation of goods in commerce.

Assuming questions "1" and "2" are answered in the affirmative,

3. Whether those, whose work is necessary to the activities of others whose activities in turn are necessary to the activities of still others elsewhere engaged in the actual production of goods, are themselves engaged in the "production of goods for commerce" within the meaning of said Act.

4. Whether the work of the maintenance employees of petitioner's office building had a sufficiently close tie with the administrative, sales, publicity and advertising activities of the tenants and their employees so as to make such maintenance work "necessary" to such tenants' activities within the meaning of said Act.

5. Whether the 20% test of substantiality adopted by the Wage and Hour Administrator on November 19th, 1943 and adopted by the Circuit Court in this case represents a proper test in these building maintenance workers cases.

Reasons Relied on for Granting the Writ.

This Court is requested to grant the Writ for the following reasons:

1. On January 2nd, 1945, this court granted the application for a writ of certiorari in *Borella* v. *Borden*, *supra*. The Circuit Court of Appeals based its determination herein upon its holding in the *Borella* case, and thereby extended the holding of that case so as to make it applicable to all multi-tenanted office buildings which house sales offices of manufacturing companies, or their representatives.

2. The decision of the Circuit Court of Appeals herein is in conflict with more than a score of decisions of State and Federal Courts (including six Circuit Courts) which have uniformly held that maintenance employees of office buildings are not covered by the Act. To mention only those

left undisturbed by this Court upon application for certiorari:

Johnson, et al. v. *Dallas Downtown Development Co.*, 132 F. 2d 287, CCA 5th, cert. den. 318 U. S. 790;

Stoike v. *First National Bank of New York*, 290 N. Y. 195, cert. den. 320 U. S. 762, October 11th, 1943;

Tate v. *Empire Building Corp.*, 135 F. 2d 743, CCA 6th, cert. den. 320 U. S. 766, October 11th, 1943;

Johnson v. *Masonic Building Co.*, D. C. Ga., 138 F. 2d 817, CCA 5th, cert. den. 321 U. S. 780, February 28th, 1944;

Rucker, et al. v. *First National Bank of Miami, Okla.*, 138 F. 2d 699, CCA 10th, cert. den. 321 U. S. 769, January 31st, 1944;

Rosenberg (Lorenzetti) v. *Semaria*, 137 F. 2d 742, CCA 9th, cert. den. 320 U. S. 770, October 18th, 1943;

Convey v. *Omaha Nat. Bank*, 140 F. 2d 640, CCA 8th, cert. den. 321 U. S. 781, March 6th, 1944.

In the opinions in three of said cases, the Circuit Courts specifically considered and rejected the contention that maintenance workers of office buildings are engaged in the production of goods for commerce.

Rucker v. *First National Bank of Miami, Okla.*;
Johnson v. *Dallas Downtown Development Co.*;
Johnson v. *Masonic Building Co.*, *supra*.

3. The holding of the Circuit Court of Appeals herein that respondents are "necessary" (within the meaning of said Act) to the activities of tenants, elsewhere engaged in producing goods, or to sales representatives who procure

contracts causing goods to be transported from factories and mines elsewhere located, is in direct conflict with the decisions in the following cases:

Johnson v. *Masonic Building Co.*, 138 F. 2d 817 (CCA 5th) cert. den. 321 U. S. 780;
Rucker v. *First National Bank of Miami, Okla.*, 138 F. 2d 699 (CCA 10th) cert. den. 321 U. S. 769;
Johnson v. *Dallas Downtown Dev. Co.*, 132 F. 2d 287 (CCA 5th) cert. den. 318 U. S. 790;
Blumenthal v. *Girard Trust Co.*, 141 F. 2d 849 (CCA 3rd).

4. The holding of the Circuit Court of Appeals herein that the maintenance workers herein were engaged in "production" because their work was "necessary" to the activities of those who prepared advertising copy is in conflict with the holding in *Walling* v. *Goldblatt Bros.*, 128 F. 2d 778 (CCA 7th) cert. den. 318 U. S. 757.

5. The decision herein should be reviewed because of the importance of the questions involved. Numerous actions involving office building maintenance workers were instituted before the legal issues herein were presumably disposed of by this Court's refusal of *certiorari* in office building cases all of which were decided in favor of the defendants.

As a result of the decision of the Circuit Court of Appeals, 2nd Circuit, in this case—and, to a lesser extent, in *Borella* v. *Borden, supra*,—there has been and undoubtedly there will be a revival of actions already instituted, numerous appeals will be taken, and new actions will be brought against multi-tenanted office building owners which house offices of tenants elsewhere engaged in the production of goods for commerce or salesmen or sales representatives of firms elsewhere engaged in manufacturing or mining.

This is a serious threat to such office building owners who will be faced with a liability retroactive to October 24th, 1938, not only for unpaid overtime wages, but for an equal amount in liquidated damages and for counsel fees, despite their reliance upon what appeared to be a well settled interpretation of the provisions of the Fair Labor Standards Act.

Prayer for Writ.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated: New York, N. Y.,
January 3, 1945.

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Supreme Court of the United States

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below.

The opinion of the District Court is reported in 51 F. Supp. 528 (R. 1033-1066).

The opinion of the 2nd Circuit Court of Appeals is not yet reported.

Jurisdiction.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code,

Section 240, as amended (Act of March 3rd, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3rd, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13th, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347).

Statement of Case.

A sufficient statement of the case will be found in the accompanying petition and in the interest of brevity will not be repeated.

Relevant Provisions of Statute Involved.

Fair Labor Standards Act of 1938—(Act of June 25th, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201-219).

"Sec. 3. As used in this Act—

* * * * *

(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." [29 U. S. C. §203(b)]

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." [29 U. S. C. §203(j)]

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees

who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." [29 U. S. C. §207(a)]

Sec. 16(b)

"Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." [29 U. S. C. §2166]

Specification of Errors.

The Circuit Court of Appeals erred as follows:

1. In holding that administrative and sales employees in offices in New York City were there engaged, in the "production of goods for commerce" as defined by the Fair Labor Standards Act, because their employers were engaged in manufacturing or mining in distant places.

2. In holding that the employees of sales agencies for manufacturing and mining companies were engaged at their offices in the production of goods for commerce within the meaning of said Act because as a result of contracts effected by such agencies goods are transported from factories and mines elsewhere located.

3. In holding that the work of maintenance workers of this office building had a sufficiently close tie with the activities of the tenants' administrative employees, sales agents, advertising and publicity workers as to make such maintenance work "necessary" to "production" within the meaning of said Act.

4. In holding that those whose work was held "necessary" for the comfort and convenience of others, whose activities in turn were necessary to the activities of still others engaged —in distant places—in the actual production of goods, were themselves engaged in the "production of goods for commerce" within the meaning of said Act.

ARGUMENT

POINT I.

The decision for which review is sought represents an extension of the holding in *Borella* v. *Borden*, 145 Fed. 2nd — cert. granted January 2, 1945, and is avowedly in conflict with the decisions of six other Circuit Courts and numerous other courts.

The *Borella* case and this case are the only reported cases in which office building workers have been held to be covered by said Act.

In every one of the following actions, brought by maintenance employees of multi-tenanted office buildings, judgment has been rendered in favor of the defendant. In every one of the seven cases in which application for certiorari was made to this court, certiorari was denied.

Johnson, et al. v. *Dallas Downtown Development Co.*, 132 F. 2d 287, CCA 5th, cert. den. 318 U. S. 790;

Stoike v. *First National Bank of New York*, 290 N. Y. 195, cert. den. 320 U. S. 762, October 11th, 1943;

Tate v. *Empire Building Corp.*, 135 F. 2d 743, CCA 6th, cert. den. 320 U. S. 766, October 11th, 1943;

Johnson v. *Masonic Building Co.*, 138 F. 2d 817, CCA 5th, cert. den. 321 U. S. 780, February 28th, 1944;

Rucker, et al. v. *First National Bank of Miami, Okla.*, 138 F. 2d 699, CCA 10th, cert. den. 321 U. S. 769, January 31st, 1944;

Rosenberg (Lorenzetti) v. *Semaria*, 137 F. 2d 742, CCA 9th, cert. den. 320 U. S. 770, October 18th, 1943;

Convey v. *Omaha Nat. Bank*, 140 F. 2d 640, CCA 8th, cert. den. 321 U. S. 781, March 6th, 1944;

Lofther v. *First National Bank of Chicago*, 48 F. Supp. 692, aff'd CCA 7th, 138 F. 2d 299;

Patterson, et al. v. *Memphis Cotton Exchange Realty Co., Inc.*, Tenn. Chancery Court, 6 WHR 308;

Brandell, et al. v. *Continental Illinois National Bank Co.*, 43 F. Supp. 781;

Cochran v. *Florida National Building Corp.*, 45 F. Supp. 830, aff'd CCA 5th, 134 F. 2d 615;

Building Service Employees Union, Local 238 v. *Trenton Trust Co.*, 53 F. Supp. 129, aff'd CCA 3rd, 142 F. 2d 257;

Baum v. *A. C. Office Building Co.*, Kansas Sup. Ct., 6 WHR 1236, November 6th, 1943;

Hinkle v. *Frank Nelson Bldg.*, 7 WHR 689, Alabama Supreme Court;

Hinkler v. *83 Maiden Lane Corporation*, D. C. N. Y., 50 F. Supp. 263;

Wideman v. *Blanchard & Calhoun Realty Co.*, D. C. Ga. 50 F. Supp. 626;

Matter of Liquidation of N. Y. Title & Mort. Co., 179 Misc. 789;

Johnson v. *Great Nat. Life. Ins. Co.*, Tex. Civ. Ap., 166 S. W. 2d 935;

Johnson v. *Filstoic*, 43 F. Supp. 930, D. C. Fla.;

Belies v. *Penn Bldg., Inc.*, Appellate Term, 1st Dept., 180 Misc. 1062, aff'd 267 App. Div. 955;

Cullen v. *Stone & Webster Building, Inc.*, 7 WHR 147, D. C. N. Y., December 24th, 1943;

Blumenthal v. *Girard Trust Co.*, 141 F. 2d 849, CCA 3rd;

Baldwin v. *Emigrant Ind. Sav. Bank*, D. C. N. Y. 7 WHR 831.

Lest it be claimed that these cases did not consider engagement in "production" as distinguished from engagement "in commerce", it should be noted that in *Johnson, et al.* v. *Dallas Downtown Development Co.*, 132 F. 2d 287 (CCA 5th) cert. den. 318 U. S. 790, in *Rucker* v. *First National Bank of Miami*, 138 F. 2d 699 (CCA 10th) cert. den. 321 U. S. 769 and in *Johnson* v. *Masonic Building* (CCA 5th), 138 F. 2d 817, cert. den. 321 U. S. 780, the Circuit Courts specifically considered and rejected the claim that maintenance employees in those office building cases were engaged in the production of goods for commerce. These cases will be discussed in detail under Point II, *infra*.

POINT II.

The decision herein is avowedly in conflict with the decisions of other Circuit Courts of Appeals which have refused to hold that maintenance employees of office buildings are engaged in production because tenants are elsewhere engaged in production.

The determination of the Circuit Court of Appeals herein is an extension of its holding in *Borella* v. *Borden*, 145 F. 2d ——, 7 WHR 804 (CCA 2; cert. granted January 2, 1945).

Said court recognized the conflict between its decisions in this and the *Borella* v. *Borden* cases and the decisions in other Circuits when it said:

> "Decisions of other Circuits which reached a contrary view seem to have rejected the rationale to which we committed ourselves in the *Borella* case and to which we shall adhere here."

The other Circuits in deciding the questions here under discussion applied the definitions provided by this Court in *Kirschbaum* v. *Walling*, 316 U. S. 517, which dealt with claims of maintenance workers of loft buildings "principally devoted" to manufacturing.

In the *Kirschbaum* case Mr. Justice Frankfurter indicated that work "necessary" to production as used in the statute means work having "a close and immediate tie with the process of production" and he stated further that where the work of an employee "has only the most tenuous relation to" the production of goods, such work is not to be considered "necessary" (p. 525 of 316 U. S.).

Similar definitions were employed in *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, *Walton* v. *Southern Package Corp.*, 320 U. S. 540 and in *Armour & Co.* v. *Wantock*, —— U. S. ——, decided December 4th, 1944. In these cases, those who dug wells were held engaged in the production of oil and watchmen and firemen employed to protect goods in the process of production were held to have a sufficiently close and direct relationship with actual production to make them "necessary" to such production.

We do not contend for any such definition of the word "necessary" as was urged upon this court in *Armour* v. *Wantock, supra*, but we do earnestly urge that in the use of the "practical judgment" referred to in the opinions in the *Armour* and *Kirschbaum* cases it is impossible to reach the conclusion that these elevator men and floor cleaners were engaged in the production of goods for commerce. They had no "close and immediate tie with" production.

Under these definitions, those who are necessary to others who, in turn, are necessary to still others who are engaged in actual production are not themselves engaged in production. Those who are twice removed from production would not have a "close and immediate tie with" production.

If these definitions are to be discarded—as they were by the Circuit Court in this and the *Borella* cases—there would be no end to the chain of producers. If elevator operators are producers of goods because they are necessary to admin-

istrative employees, salesmen, stenographers and accountants who, in turn, are necessary to manufacturing activities in another state, then the bus drivers who bring the elevator man to work, the tailor who cleans the bus driver's uniform and the gasoline station attendant who fills the bus' tank are likewise in a "remote" sense "necessary" to production in distant places.

Other circuit courts have met this problem of "drawing lines" by following the directions and definitions of this court laid down in the *Kirschbaum* case.

Thus, in *Johnson* v. *Masonic Bldg. Co.*, 138 F. 2d 74, cert. den. 321 U. S. 780, there were a number of tenants who produced goods outside of their offices in the building involved in that case. Referring to such occupancy, the 5th Circuit Court said:

> "The building employees are not doing anything that is necessary to or even directly contributes to such production. The case is not like *Kirschbaum* v. *Walling*, 316 U. S. 517 [5 WHR 442], where the building was devoted to the production of such goods. If the office men of Merry Bros. Brick and Tile Company and Southeastern Bituminous Company can be said to be producers of goods, the appellants, employed by another employer with no especial reference to the business of any tenant, cannot be held to be so engaged because these tenants were producing goods elsewhere."

In *Rucker* v. *First National Bank of Miami*, 138 F. 2d 699 CCA 10th, cert. den. 321 U. S. 769, the Court found that the building therein was occupied by executive and administrative offices of a mining and smelting company, the executive offices of a railroad company, the office of the company engaged in selling chat and crushed rock, an abstract company, the sales office of an extension university, sales office of DuPont Company, brokers, etc.

Referring to this type of occupancy, the Court said:

> "Specifically, we are urged to hold that these employees, as elevator operators, were engaged in the production of goods for commerce on the authority of Kirschbaum Co. v. Walling, supra."
>
> * * * * *
>
> "But the facts before us which bear upon the phrase 'production of goods for commerce' are only remotely analogous to the facts in the *Kirschbaum* case. The executive and administrative offices of the mining and smelting company were located in the building serviced by the elevator operators, and this company was doubtless engaged in the production of goods for commerce, but it is not shown on this record whether any of the goods were produced in the building, or that any of the employees transported to and from the offices are directly or indirectly engaged in the production of the goods. The same is true of the chat and crushed rock company, and the abstract company, which produced abstracts, some of which were shipped in interstate commerce. *In any event, the relationship is not shown to be 'close and immediate'.* Under these facts it cannot be said that the activities of the elevator operators were an essential part of, or necessary to, the production of goods for commerce" (at p. 702). (Italics ours.)

POINT III.

The holding that sales representatives are producers of goods conflicts with the reasoning and determinations of this and other courts in related cases.

In order for the Circuit Court of Appeals to find substantial production in the building herein, it was necessary to

hold that the work of sales offices and sales agencies constitutes production. On this subject, the Circuit Court said:

"For the purpose of the statute, the sales agencies representing mining and manufacturing concerns are engaged in the production of goods for commerce. The Act covers 'goods' until 'their delivery into the actual physical possession of the ultimate consumer.' Section 3(i) [29 U. S. C. A. §203(i)]. And 'production' is defined to include 'handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof.' Section 3(j) [29 U. S. C. A. §203(j)]. Thus, transportation of goods until their delivery to the ultimate consumer is 'production' as defined by the statute. A sales agent who procures the contracts in performance of which the goods are 'transported' is therefore engaged in the production of goods for commerce, since he is 'necessary' to the 'transporting'. It may be contended that such a construction would bring all retailers within the Act and that Congress had no such intention. §13(a)(2) of the Act [29 U. S. C. A. §213(a)(2)], however, specifically excludes employees 'engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce.' This would indicate that where the 'selling or servicing is in [interstate] commerce' the employees are to be included in the scope of the Act.

Moreover, sales agents may be considered as engaged in 'handling' the goods by arranging their transfer from one person to another. * * * And §13(a)(5) [29 U. S. C. A. §213(a)(5)] specifically excludes employees engaged in 'marketing' and 'distributing' of certain designated products. By implication, marketing and dis-

tributing of other products would seem to be included within the Act."

A. The above quotation makes it clear that the Court below failed to distinguish between engagement in commerce and engagement in production of goods for commerce. There can be no question that those who transport and those who distribute goods in interstate commerce are "included within the Act", but they are included because they are "engaged in commerce", within the meaning of the Act, and not because they are engaged in "production of goods for commerce" or in an occupation necessary thereto.

B. The construction of the Court below also raises the question as to what Congress meant by an "occupation necessary to the production thereof".

From what this Court said in *Kirschbaum* v. *Walling*, *supra*, and later cases, it would seem to mean necessary to actual production of goods in the usual and accepted sense.

C. If "transportation of goods until their delivery to the ultimate consumer is 'production' ", then all warehouse and other employees of wholesalers would be covered by the Act. There would, then, be no basis for distinction, such as was made by this Court, between warehouse employees of wholesalers handling goods whose interstate journey had not come to an end and those working with goods to be sold and delivered to retailers intrastate.

> *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564;
> *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572.

D. Furthermore, railroads are engaged in transportation. Maintenance of way employees are much closer to such transportation and much more "necessary" thereto than are sales

agents. And yet, in *McLeod* v. *Threlkeld*, 319 U. S. 491, this Court held:

> "McLeod was not engaged in the production of goods for commerce. His duties as cook and caretaker for maintenance-of-way men on a railroad lie completely outside that clause."

A footnote in the opinion in the *McLeod* case cites cases holding that cooks employed to feed production workers are within the Act.

It would seem, therefore, that sales agencies, while engaged in interstate commerce, are not engaged in the production of goods for commerce and so even if elevator operators and porters may be considered to have a sufficiently close tie with the sales activities carried on in this building so as to make their work necessary to such activities within the meaning of the Statute, such maintenance workers would not, because of that (assumed) fact, be covered by the Act.

The holding herein that sales agencies are engaged in the production of goods for commerce conflicts with the decision in *Johnson v. Downtown Development Co.*, 132 F. 2d 287 (CCA 5th) cert. den. 318 U. S. 790.

In the *Johnson* v. *Dallas Downtown Development Co.* case, there were the following among the 31 tenants occupying the building involved in that case:

> The Texas Daily Press League—an advertising organization as a result of its efforts "mats and plates are sent by advertisers outside of Texas to newspapers located in Texas" (Rec., pp. 18-19).

A manufacturer's agent, representing companies outside of Texas, who "maintains a small stock of regulators for controlling air in his office and made deliveries" (Rec., pp. 19-20).

A non-profit trade association of newspapers which sends out "bulletins through the mail" and acts as a general clearing house for information and trade problems (Rec., pp. 22-23).

An advertising agency which places advertising "outside of Texas for clients inside of Texas, including placing advertising in national magazines, arranging radio broadcasts and sending copies, mats, transcriptions, checks, contracts and correspondence * * * to points outside of Texas" (Rec., p. 27).

A branch of the International News Service, a press association, "engaged in furnishing news and feature material for newspapers with headquarters in New York City". This organization has a "teletype connection to points outside of Texas over which it receives and transmits news" (Rec., pp. 27, 28).

An agency of a manufacturer of proprietary remedy—"orders filled by shipments from the stock maintained in this office, which is replenished by order from San Francisco; shipment is made * * * to and from points outside of Texas" (Rec., p. 30).

A representative of Southwest Carbon and Ribbon Co., "makes sales outside of Texas and ships the merchandise from this office to such points; he does no manufacturing but does cut typewriter ribbons into shorter lengths, inserts fasteners and winds them on spools for sale and then ships some of them to points outside of Texas" (Rec., p. 32).

The 5th Circuit did not consider these sales agencies necessary to production, saying:

> "So that whether we look alone to the wordings of Sections 6(a) and 7(a) respecting the 'production of goods for commerce' or the definition of 'produced' found in Section 3(j) of the Act, it is perfectly clear that neither Appellants nor any person with whom Appellants had any sort of contact or sustained any kind of relation was engaged in or about the building in the production of goods for commerce within the meaning of the Act" (p. 289).

The 3rd Circuit Court of Appeals in *Blumenthal* v. *Girard Trust Co.*, 141 F. 2d 849, also rejected the claim that a wholesaler is engaged in the production of goods for commerce within the meaning of the Act. There, the action was instituted by a janitor who claimed to be necessary to production because of a tenant's receipt and shipment of automobile parts in interstate commerce. In dealing with this contention, the Court said:

> "Under the present facts the manufacture of the automotive parts had been concluded prior to the parts being received by the tenant at all. There was nothing he did with them, that rendered them any more complete or that was intended to be an operation necessary to their final development. He merely wrapped and mailed out the merchandise in exactly the same condition as it was when turned over to him. He was in no way connected with the process of production of the automotive parts themselves."

POINT IV.

The holding of the court below that maintenance workers are covered because their activities are necessary to those who prepare advertising is in conflict with the decision in *Walling v. Goldblatt Bros.*, 128 F. 2d 778 (CCA 7th) cert. den. 318 U. S. 757.

Walling v. *Goldblatt Bros.*, 128 F. 2d 778 (CCA 7th) cert. den. 318 U. S. 757, dealt with the claims of warehouse and other employees of the defendant which operates ten department stores in Illinois and Indiana. The 7th Circuit in that case held that some employees were covered by the Act and others were not, and that those workers who were engaged in "preparing * * * advertising copy are not subject to the Act" (p. 784 of 128 F. 2d).

If those preparing advertising copy are not engaged in commerce or in the production of goods for commerce, *a fortiori*, building maintenance employees would not be engaged in production of goods for commerce by reason of their relationship with those who prepare the copy.

In *Lofther* v. *First Nat. Bank of Chicago*, 48 Fed. Supp. 692, 697, affirmed CCA 7th, 138 F. 2d 299, Judge Sullivan gave consideration to the question we are here discussing. He took the view that

> "reports, statements, and other written materials received by and emanating from the offices of banks and of the tenants"

constituted "goods" as defined by the Act. He said, however:

"I am convinced that the janitors and elevator operators, by reason of their activities are not so engaged in * * * the production of these goods for commerce, as to bring them under the provisions of the Act * * *".

POINT V.

The decision of the Circuit Court of Appeals herein should be reviewed because of the important questions involved.

Except through repeated denials of certiorari, this Court has not indicated its views and it has not directly passed upon the coverage of office building maintenance employees.

The Second Circuit Court of Appeals in this case has expressed disagreement with the conclusions reached in cases which were left undisturbed upon certiorari application to this Court.

If the decision in this case is not reviewed, owners of hundreds of office buildings in the Second Circuit will be confronted with liabilities not only for overtime wages covering a period of six years, but also for liquidated damages and counsel fees, while building owners in other jurisdictions will be free from such liability.

The determination which we ask this Court to review also affects wholesalers doing intrastate business, and sales and advertising agencies and other firms, whose business is (remotely) related to manufacturing and mining.

In the numerous decisions construing the Fair Labor Standards Act, the courts have drawn lines suggested by Mr. Justice Frankfurter in *Kirschbaum* v. *Walling*, *supra*. These lines, until now, have been fairly clear. To be con-

sidered "necessary" to production an employee's work had to have a "close"—not indirect—relationship with actual production of goods.

If the determination of the Court below remains in effect, great confusion will be caused and numerous employers who, as in this case (R. 1052), compensate their employees to an extent well in excess of the requirements of the Act will be liable to penalties as a result of their arrangements of hours and wages in reliance upon what seemed to have been a well settled interpretation of the provisions of the Act.

The ruling in this case is much more far reaching than that in *Borella* v. *Borden, supra*. Certiorari having been granted by this court in the *Borella* case, this application should likewise be granted. That the Circuit Court in dealing here with a multi-tenanted office building, extended its definition of "necessary to production" beyond its holding in the *Borella* case, is made clear by the Wage and Hour Administrator's brief in Circuit Court in the *Borella* case, where he said:

> "The building herein involved is used as headquarters for directing and controlling the manufacture of all of the Borden products."
>
> *"Moreover, whatever may be said of other mulfi-tenant office buildings*, this building was devoted primarily to the production of goods and plaintiffs were employed there because they would facilitate the company's business of producing goods." (Italics ours.)

In *Kirschbaum* v. *Walling*, 316 U. S. 517, and in later cases, in which the Fair Labor Standards Act has been construed, this court, again and again, has pointed out that Congress, in enacting said Act, did not exercise its full con-

stitutional power. It did not, as was done in the case of the amendment to the Federal Employers' Liability Act, extend coverage "to employees who 'shall in any way directly or closely and substantially affect' interstate commerce. 53 Stat. 1404". *Kirschbaum* v. *Walling*, 316 U. S. 517, 522.

As pointed out in said case:

> "* * * when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." (p. 522 of 316 U. S.)

If the determination of the court below remains undisturbed and if this court's definitions of "necessary to production of goods for commerce" are discarded, as was done in this case, there will be no field of endeavor left to local control.

Those who purchase goods are just as necessary to production as those who sell goods. Those who feed, transport and house salesmen, whether it be at a hotel or any other place are just as necessary to production as were the maintenance workers in this case.

Such an extension of the coverage of the Act would, it is clear, deserve "the stigma of judicial legislation".

CONCLUSION.

It is respectfully submitted that the petition for Writ of Certiorari in this case should be granted.

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